Fordham Law Review

Volume 83 *Volume 83*
Issue 2 *Volume 83, Issue 2*

Article 22

2014

Not Just for Products Liability: Applying the Economic Loss Rule Beyond Its Origins

Danielle Sawaya
Fordham University School of Law

NOT JUST FOR PRODUCTS LIABILITY: APPLYING THE ECONOMIC LOSS RULE BEYOND ITS ORIGINS

*Danielle Sawaya**

Most litigants, if given the chance, prefer to assert tort theories to recover their economic losses, rather than rely on the remedies provided under contract law. This is primarily because plaintiffs have the potential to recover more damages under tort law than contract law. However, most courts have adopted a doctrine known as the economic loss rule to bar plaintiffs from asserting certain tort theories to recover for their economic loss. Although the economic loss rule may seem like an easy way to maintain the boundary between tort law and contract law, confusion abounds when courts attempt to determine the proper contexts in which to apply the doctrine.

In 2013, the Florida Supreme Court resurrected issues of the doctrine's proper scope when it rendered Tiara Condominium Ass'n v. Marsh & McLennan Cos.*, which restricted application of the doctrine to products liability cases. Although the Florida Supreme Court has held that the economic loss rule applies only when a defective product causes pecuniary loss to the plaintiff, other jurisdictions adhere to a broader application of the doctrine. In these jurisdictions, the doctrine serves a fundamental purpose to protect the boundary line between tort law and contract law by preventing parties who are in contractual privity from circumventing the bargain that they made in their contract. This Note argues that the economic loss rule is not just for products liability, but should be applied to serve such a fundamental purpose, specifically where sophisticated parties engage in arms-length transactions, bargaining for the allocation of risk and economic loss in their contract.*

* J.D. Candidate, 2015, Fordham University School of Law; B.A., 2010, Dartmouth College. I would like to thank my faculty adviser, Professor Gail Hollister, for her thoughtful comments and guidance. I am also especially grateful to my family and friends for their unwavering support and encouragement.

INTRODUCTION

Suppose a contractor purchases a new truck for hauling equipment in his construction business. One day when he was attempting to slow down for a turn, he discovered that the brakes did not work. The vehicle overturned, but luckily he was not injured. It took two weeks to fix the truck and cost $5000. As a result of his inability to use the vehicle, the contractor's business operations were disrupted, causing him to lose $9000 in profit. If the contractor sues the manufacturer or distributor of his truck, may he recover the cost of repair and his lost earnings?[1]

Assume a buyer purchases a laptop computer for use in her business. The laptop is defective, malfunctions, and requires a week to be repaired. As a result, the laptop purchaser loses business. In fact, she is able to prove that the defective laptop caused her to lose $50,000 in profit. If the laptop owner sues the laptop manufacturer, may she recover her lost profit?

Finally, suppose a fisherman purchases a motor and installs it in his boat for his fishing business. The motor turns out to be defective and catches fire. Fortunately, the fisherman was not injured. However, because of the defective motor the fisherman was not able to fish during the peak of the season and thus lost a substantial profit. If the fisherman sues the manufacturer or distributor of the motor, may he recover for his economic loss?

Courts usually answer each of the foregoing questions in the negative.[2] The reason courts generally will not allow the contractor, the laptop purchaser, and the fisherman to recover for their economic losses is because of a tort doctrine known as the economic loss rule.[3] The economic loss rule bars plaintiffs from recovering tort damages for their economic loss where the plaintiff has not sustained personal injury or property damage.[4] The genesis of the economic loss rule can be traced to California where the state's highest court barred a plaintiff from recovering economic damages

1. The facts in this hypothetical are adapted from *Seely v. White Motor Co.*, 403 P.2d 145 (Cal. 1965).

2. *See, e.g.*, E. River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 871 (1986) (noting that where only a product is injured the plaintiff's remedy lies in contract and warranty law); *Seely*, 403 P.2d 145 (precluding the plaintiff from recovering damages for his defective truck based on a strict products liability theory); Dobrovolny v. Ford Motor Co., 793 N.W.2d 445 (Neb. 2011) (barring recovery based on a products liability theory where the plaintiff's Ford pickup truck caught fire and burned, but did not cause physical injury or damage to other property).

3. *See* 2 DAN B. DOBBS ET AL., THE LAW OF TORTS § 449 (2d ed. 2011).

4. *See Seely*, 403 P.2d at 151 (noting that a manufacturer's liability is limited to instances where the plaintiff sustains physical injury and "there is no recovery for economic loss alone"); *see also* 2 DOBBS ET AL., *supra* note 3, § 449.

caused by a defective truck.[5] Twenty-one years later, the U.S. Supreme Court adopted the doctrine in an admiralty case involving a defective product.[6] Today, most jurisdictions have followed suit and apply the doctrine to preclude plaintiffs from recovering tort damages for a defective product, absent personal injury or property damage.[7]

Although the majority of jurisdictions apply the economic loss rule in the context of products liability, confusion abounds with respect to the doctrine's application outside the realm of products liability cases.[8] In fact, the Florida Supreme Court, after expanding the doctrine beyond the products liability context, returned the economic loss rule to its origins.[9] In *Tiara Condominium Ass'n v. Marsh & McLennan Cos.*,[10] the Florida Supreme Court stated that the expansion of the economic loss rule outside of products liability had become "unwise and unworkable in practice."[11] However, as one of the dissenting opinions note, the majority's decision failed to explain why the economic loss rule is appropriate in products liability cases but is "unworkable or unwise in [a] broader context."[12]

Tiara illustrates the principal issue surrounding the economic loss rule: whether (and to what extent) the doctrine should apply outside of the products liability context. Although there are many variations of the economic loss rule, it is not the intent of this Note to explain application of the doctrine in each and every context or in each and every jurisdiction. Rather, this Note focuses on the doctrine's application in the State of Florida and on the Florida Supreme Court's decision to limit the economic loss rule to products liability cases. This Note contends that the doctrine is not just for products liability, and such a bright-line approach undermines the doctrine's fundamental purpose to protect the boundary line between tort law and contract law. Instead, the Florida courts should return to applying the doctrine in contractual privity contexts. This Note, however, does not argue for application of the doctrine in every circumstance where the parties are in contractual privity. Rather, this Note argues that the economic loss rule should be applied in the specific context where sophisticated parties to a contract have bargained (or could have bargained) for the allocation of risk and economic loss in their contract, and it offers a

5. *Seely*, 403 P.2d at 151–52.

6. *E. River*, 476 U.S. at 871 ("[W]e adopt an approach similar to *Seely* and hold that a manufacturer in a commercial relationship has no duty under either a negligence or strict products-liability theory to prevent a product from injuring itself.").

7. *See id.* at 868 (noting that the majority land-based approach "precludes imposing tort liability if a defective product causes purely monetary harm"); Reeder R. Fox & Patrick J. Loftus, *Riding the Choppy Waters of* East River*: Economic Loss Doctrine Ten Years Later*, 64 DEF. COUNS. J. 260, 261 (1997) (asserting that *East River* profoundly influenced the adoption of the economic loss rule in a majority of jurisdictions); Vincent R. Johnson, *The Boundary-Line Function of the Economic Loss Rule*, 66 WASH. & LEE L. REV. 523, 526 (2009) (stating that there is a "high degree of agreement" that purely economic losses resulting from a defective product are not recoverable under tort law).

8. *See* Johnson, *supra* note 7, at 526–28.

9. Tiara Condo. Ass'n v. Marsh & McLennan Cos., 110 So. 3d 399, 407 (Fla. 2013).

10. 110 So. 3d 399 (Fla. 2013).

11. *Id.* at 407.

12. *Id.* at 413 (Canady, J., dissenting).

framework that entails absolute deference to contract. It is arguably in such circumstances that the doctrine's purpose of maintaining the boundary line between tort law and contract law is most validated.

Part I of this Note provides an overview of the economic loss rule. Specifically, it examines what the doctrine is, the types of losses that fall within its purview, and the origin and development of the rule. Part II examines the Florida courts' struggle to define the scope of the economic loss rule and the Florida Supreme Court's decision to restrict application of the doctrine exclusively to products liability cases. Finally, Part III argues for a broader application of the doctrine, particularly where sophisticated parties engage in arms-length transactions, bargaining for the allocation of risk and economic loss in their contract. When such conditions are present, the economic loss rule should be applied, unless the contract says otherwise.

I. BACKGROUND OF THE ECONOMIC LOSS RULE: FROM PRODUCTS LIABILITY TO CONTRACTUAL PRIVITY

The economic loss rule is a broad rule that is applied in several types of cases. This part provides an overview of the economic loss rule by discussing two particular situations where the doctrine is applied: (1) products liability cases and (2) contractual privity cases.[13] Part I.A introduces the general concept of the economic loss rule and considers the specific types of losses that fall within its purview. Part I.B surveys the origin and development of the economic loss rule in American jurisprudence. Lastly, Part I.C examines application of the doctrine in cases where the parties to a contract are in contractual privity.

A. Understanding the Economic Loss Rule and What Constitutes Economic Loss

This section explains the general concept of the economic loss rule. It then discusses the types of losses that fall within the scope of the doctrine. Next, it provides examples of what constitutes noneconomic loss, and thus potentially recoverable under tort law. Finally, this section concludes by discussing the benefits of suing under a tort theory rather than relying on the remedies of contract law.

1. What Is the Economic Loss Rule?

In the most basic sense, the economic loss rule is a judicially created doctrine that serves to prevent plaintiffs from recovering damages under tort law (generally, strict liability claims and negligence claims)[14] when the

13. For purposes of this Note, references to contractual privity cases include products liability and non-products liability cases.

14. Johnson, *supra* note 7, at 528. Although the broad term "tort law" is often used to express the concept of the economic loss rule, it is important to note that the doctrine does not bar recovery for pure economic loss for *all* torts. *See id.* at 529–34. There are exceptions under tort law where the doctrine does not prevent plaintiffs from recovering damages for

only harm suffered is pure economic loss.[15] Several Florida courts have observed, however, that the economic loss rule is "stated with ease but applied with great difficulty."[16] To a large extent, the confusion and difficulty surrounding the doctrine's application is due to the fact that the economic loss rule is not a single rule.[17] Rather, it is a general rule under which several sub-rules or variations of the rule exist.[18] This is because economic losses arise from a variety of situations, requiring different analyses.[19]

Before the Florida Supreme Court restricted application of the economic loss rule exclusively to the products liability context,[20] Florida courts primarily applied the doctrine in two situations: products liability cases and cases where contractual privity existed between the parties.[21] Within the context of products liability, the economic loss rule prohibits a plaintiff from recovering damages in tort when a defective product causes purely economic loss.[22] In other words, a defendant's tort liability with respect to a defective product is limited to instances where the plaintiff sustains personal injury or property damage to property other than the product itself.[23] In a contractual context, a plaintiff who incurs purely economic loss as a result of the defendant's breach of an express or implied contractual duty is barred from recovering tort damages, absent an independent tort duty.[24] In other words, a plaintiff's tort action to recover

---

their pure economic loss (e.g., intentionally tortious conduct). *Id.* Such exceptions, however, are beyond the scope of this Note.

15. *See* Seely v. White Motor Co., 403 P.2d 145, 151 (Cal. 1965) (stating that "a manufacturer's liability is limited to damages for physical injuries and there is no recovery for economic loss alone"); *see also* Johnson, *supra* note 7, at 525–26. For purposes of this discussion, pure economic loss can be understood as financial costs to the plaintiff that do not arise from personal injury to the plaintiff or damage to the plaintiff's property. *See* Ralph C. Anzivino, *The Economic Loss Doctrine: Distinguishing Economic Loss from Non-Economic Loss*, 91 MARQ. L. REV. 1081, 1082 (2008).

16. *See, e.g.*, Indem. Ins. Co. of N. Am. v. Am. Aviation, Inc., 891 So. 2d 532, 544 (Fla. 2004) (Cantero, J., concurring) (noting that such phrase has been cited in Delgado v. J.W. Courtesy Pontiac GMC-Truck, Inc., 693 So. 2d 602, 606 (Fla. Dist. Ct. App. 1997); Sandarac Ass'n v. W.R. Frizzell Architects, Inc., 609 So. 2d 1349, 1352 (Fla. Dist. Ct. App. 1992)); *see also* Comptech Int'l, Inc. v. Milam Commerce Park, Ltd., 753 So. 2d 1219, 1224 (Fla. 1999) (noting that "confusion . . . has abounded in this area of law").

17. *See* 3 DOBBS ET AL., THE LAW OF TORTS § 607 (2d ed. 2011). According to Dobbs, references to "the" economic loss rule are misleading because it implies that there is one overarching rule that courts apply. *Id.*

18. *See id.*

19. *Id.* Although there are several variations of the economic loss rule, this Note primarily focuses on the products liability and contractual privity forms of the rule. As such, other variations of the doctrine are beyond the scope of this Note and will not be addressed.

20. Tiara Condo. Ass'n v. Marsh & McLennan Cos., 110 So. 3d 399, 407 (Fla. 2013) (holding that "the economic loss rule applies only in the products liability context").

21. *Am. Aviation*, 891 So. 2d at 534 (limiting the economic loss rule to "circumstances where the parties are either in contractual privity or the defendant is a manufacturer or distributor of a product, and no established exception to the application of the rule applies").

22. *Id.* at 538–41.

23. *Id.*

24. *Id.* at 536–38. An example of a tort independent of the contract is fraud. *Id.* at 543 n.3.

purely economic loss will be barred where the defendant has not committed a breach apart from the breach of contract.[25]

2. What Qualifies As "Economic Loss" for Purposes of the Economic Loss Rule?

Before exploring the development of the economic loss rule, it is important to distinguish economic loss from noneconomic loss. The distinction is important because the type of loss incurred dictates whether the plaintiff will be able to recover damages based on a tort theory or a breach of contract claim, if any.[26]

In the most general sense, economic losses are "disappointed economic expectations."[27] In the context of products liability, economic loss may include damages for inadequate value of a product, costs of repair and replacement of the defective product, or consequential lost profits as a result of a defective product.[28] According to the Restatement (Third) of Torts on products liability, if a defective product[29] causes purely economic loss, a plaintiff's claim for damages cannot be resolved through tort law but is limited to the terms of the contract and the Uniform Commercial Code (UCC).[30] The Restatement provides examples of what constitutes economic loss, illustrated below.[31]

a. Harm Only to the Product Itself

One type of pure economic loss is when the product causes harm only to itself.[32] This type of harm comes in two forms.[33] First, a product may be defective causing a buyer to incur repair or replacement costs.[34] Second, a

25. *Id.* at 536–37.

26. *See* Anzivino, *supra* note 15, at 1082. For a discussion of the advantages of suing on a tort theory rather than on a breach of contract claim, see *infra* Part I.A.4.

27. Casa Clara Condo. Ass'n v. Charley Toppino & Sons Inc., 620 So. 2d 1244, 1246 (Fla. 1993) (quoting Sensenbrenner v. Rust, Orling & Neale Architects, Inc., 374 S.E.2d 55, 58 (Va. 1988); Stuart v. Coldwell Banker Commercial Group, Inc., 745 P.2d 1284 (Wash. 1987)).

28. *Id.* (quoting Note, *Economic Loss in Products Liability Jurisprudence*, 66 COLUM. L. REV. 917, 918 (1966)).

29. The Restatement defines a product as "tangible personal property distributed commercially for use or consumption." RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 19(a) (1998). Other items, such as real estate, may also be considered a product when the context of its use is analogous to the use of tangible personal property. *Id.* Services, however, are not considered products. *Id.*

30. *Id.* § 21 cmt. a.

31. *See infra* notes 32–52 and accompanying text; *see also* Anzivino, *supra* note 15, at 1087–92.

32. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 21 cmt. d.

33. *Id.*

34. *Id.* An example is the cost of repair of a truck after defective brakes caused the vehicle to overturn. *See* Seely v. White Motor Co., 403 P.2d 145, 147–48 (Cal. 1965) (reviewing plaintiff's action against a manufacturer and distributor for the cost of repair of his truck in the amount of $5466.09 after defective brakes caused the vehicle to overturn).

buyer may sustain consequential losses[35] as a result of a defect in the product.[36] The Restatement provides an illustration of the latter form of economic loss: ABC company sells a conveyer belt to XYZ automobile company.[37] After XYZ installs the conveyer belt in its engine assembly line, a defect in the conveyer belt causes it to break.[38] As a result, the production lines shut down.[39] XYZ loses valuable production time when launching its best-selling new model.[40] The trier of fact finds that the shutdown of the production lines caused XYZ to lose the sales of the cars that would have been produced.[41] It also finds that XYZ lost the opportunity to be the first to market the new model thereby losing millions of dollars to its rival company which was able to introduce its new model a week ahead of XYZ instead of a week behind it.[42] According to the Restatement, XYZ has suffered pure economic loss in the form of consequential losses and cannot recover from ABC under a tort cause of action.[43]

b. Harm As a Result of a Component Part of an Integrated System

Another type of pure economic loss that is not recoverable under tort law is harm that results from a defective product that is a component part of an integrated system that causes harm only to the integrated system.[44] Such harm is deemed to be damage to the product itself (and not damage to other property for which tort remedies may be available).[45] This is known as the integrated system rule.[46] Under this rule, when the defective product and the system are considered to be an integrated whole and the harm caused by the defective product is limited to the system itself, such harm will not be

35. For purposes of this discussion, consequential loss may be understood as indirect financial loss as a result of the defective product. *See* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 21 cmt. d. Loss of profit is one example. *See* Anzivino, *supra* note 15, at 1088.

36. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 21 cmt. d.

37. *Id.* § 21 cmt. d, illus. 3.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *See id.* A more difficult situation may arise where the defect in the product makes it unreasonably dangerous, but the product does not cause harm to persons or property. *Id.* § 21 cmt. d. The Restatement acknowledges that a plausible argument may be made that products that are dangerous, and not merely inoperable, should be subject to products liability law. *Id.* Nevertheless, a majority of jurisdictions have held that the remedies under the UCC—repair and replacement costs and consequential economic loss—are sufficient. *Id.*

44. *See* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 21 cmt. e; Anzivino, *supra* note 15, at 1088.

45. Anzivino, *supra* note 15, at 1088.

46. *Id.* The integrated system rule was applied by the U.S. Supreme Court in *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986). For a more detailed discussion of the Court's application of the rule, see *infra* Part I.B.2.

considered damage to other property.[47] Rather, such harm is purely economic loss and unrecoverable under tort law.[48]

An example of the integrated system rule can be seen in the Restatement's illustration of the conveyer belt.[49] The defective conveyer belt is a component part of the assembly line.[50] The damage to the assembly line that caused XYZ's lost profits is considered damage to the product itself, and so it may not be recovered under tort law.[51] The Restatement notes that rejecting the integrated system rule would result in a finding of property damage in essentially every case in which a product harms itself.[52]

c. Pure Economic Loss Caused by Economic Torts

Economic torts concern pure economic losses (i.e., financial losses that do not result from personal injury or property damage) in which the plaintiff maintains a legally recognized possessory or ownership interest.[53] Dan Dobbs provides such an example where a defendant negligently blocks access to a plaintiff's store, without actually harming the property itself.[54] In this example, the plaintiff has suffered pure economic loss because the only harm the plaintiff incurred was a loss of profit from the inability of customers to access the store.[55] This type of economic harm does not provide the storeowner with a legally recognized interest.[56] Thus, the storeowner's claim for pure economic loss will be precluded under the economic loss rule.[57]

3. Noneconomic Loss: The Economic Loss Rule Does Not Bar Recovery for Economic Harm or "Other Property Damage"

Economic harm may be distinguished from stand-alone economic torts.[58] Unlike stand-alone economic torts, economic harm can result from any type of tort.[59] For example, medical bills and loss of wages may occur because of a tort that causes the plaintiff to suffer personal injury or even emotional harm; and decreased property value and repair costs are economic harms that may result from torts that cause physical damage to property.[60]

---

47. *See* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 21 cmt. e; Anzivino, *supra* note 15, at 1088.
48. *See* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 21 cmt. e; Anzivino, *supra* note 15, at 1088.
49. *See* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 21 cmt. d, illus. 3.
50. *Id.*
51. *See id.*
52. *Id.* § 21 cmt. e.
53. *See* 3 DOBBS ET AL., *supra* note 17, § 605.
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*

However, each such instance of economic harm is not an economic tort;[61] rather, the economic harm is a part of the damages resulting from a personal injury or property tort.[62] Such forms of economic harm do not fall within the scope of the economic loss rule, and therefore, plaintiffs are not precluded from recovering these damages.[63]

Another form of economic harm that does not fall within the purview of the economic loss rule is when the harm caused by a defective product is to "other property."[64] A product that is unworkable or malfunctions due to a defect and causes harm to surrounding property has caused "other property damage."[65] For example, if a defective automobile blows up without damaging any surrounding property or persons, the claim is subject to the economic loss rule and leaves the owner to sue on the warranty or not at all.[66] However, if the defective automobile also blows up a neighboring home, the home is considered "other property" and not the product itself.[67] Thus, the homeowner may recover damages to the home based on a tort claim.[68]

As previously discussed, when economic harm comes from "other property damage," a plaintiff's claim ordinarily will not be barred by the economic loss rule.[69] This is because the damage to the surrounding property extends beyond the product or its integrated system.[70] The Restatement illustrates this type of damage with a hypothetical.[71] A company has an assembly line at its plant.[72] A defective steering mechanism in the company's forklift causes the forklift to go out of control and damage the assembly line.[73] The damages stemming from the defective forklift are considered to be "other property damage" actionable through tort theories.[74] Because the defective steering mechanism caused damage beyond the forklift to the assembly line, the integrated system rule is not applicable.[75] The damages are noneconomic losses and potentially recoverable under tort theories.[76]

---

61. *Id.*
62. *Id.*
63. *See id.* ("Such a claim for pure economic loss will often be rejected under one of the economic loss rules.").
64. *See* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 21 cmt. e (1998); 2 DOBBS ET AL., *supra* note 3, § 449.
65. 2 DOBBS ET AL, *supra* note 3, § 449.
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *See id.*
71. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 21 cmt. e, illus. 4 (1998).
72. *Id.*
73. *Id.*
74. *See id.* § 21 cmt. e.
75. *See id.*
76. *See id.*

The Supreme Court considered the issue of what constitutes "other property" in *Saratoga Fishing Co. v. J.M. Martinac & Co.*[77] The case involved a defective hydraulic system that caused the engine room in a fishing vessel to flood, catch fire, and ultimately sink the boat.[78] Saratoga brought a products liability suit against the designer of the ship's hydraulic system and the builder of the vessel.[79] Saratoga had purchased the fishing vessel from the initial owner who had added equipment to the ship after he had purchased it.[80] The Court concluded that the damage to the boat was not recoverable because it constituted the product itself.[81] The issue before the Court was whether the added equipment was part of the boat (i.e., the "product itself" in which case the plaintiff could not recover under a tort theory for any loss) or whether it constituted "other property" (in which case the plaintiff could potentially recover).[82] The Court held that the subsequently added equipment qualified as "other property," and thus recovery for the damage to the equipment was available.[83]

4. Why a Plaintiff May Prefer to Sue on a Tort Theory Rather than Under a Contract

Generally, breach of contract claims result when a party violates the terms of an agreement made with another party, whereas tort claims are generally pursued where the plaintiff has incurred physical injury or property damage.[84] However, there are instances where a tort claim and a contract claim can ensue from the same conduct.[85] In such cases, plaintiffs will often attempt to assert both contract and tort claims.[86] Affording a plaintiff a tort remedy, as opposed to a contract remedy, has certain

77. 520 U.S. 875 (1997); *id.* at 886 (Scalia, J., dissenting) ("Not a single lower court decision (other than the one under review) has addressed the precise question presented: the status as 'other property' of additions made by a prior purchaser who was a user.").

78. *Id.* at 877 (majority opinion).

79. *Id.*

80. *Id.* The equipment added by the initial owner after he purchased the fishing vessel included a skiff, a fishing net, spare parts, and miscellaneous equipment. *Id.*

81. *See id.* ("In this case all agree that the 'product itself' consists *at least* of a ship as built and outfitted by its original manufacturer and sold to an initial user.").

82. *Id.*

83. *Id.* at 884–85.

84. *See* TODD SORENSEN ET AL., WHEN CAN A BREACH OF CONTRACT BE A TORT AND WHAT DIFFERENCE DOES IT MAKE?, A.B.A. CLE SEMINAR (Feb. 16–19, 2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2012_cccle_materials/12_tort.authcheckdam.pdf.

85. R. Joseph Barton, *Drowning in a Sea of Contract: Application of the Economic Loss Rule to Fraud and Negligent Misrepresentation Claims*, 41 WM. & MARY L. REV. 1789, 1797 (2000).

86. *See, e.g.*, AFM Corp. v. S. Bell Tel. & Tel. Co., 796 F.2d 1467, 1468 (11th Cir. 1986) (involving claims for negligence and breach of contract); Fla. Power & Light Co. v. Westinghouse Electric Corp., 785 F.2d 952, 953 (11th Cir. 1986) (involving claims for negligence and for breach of express warranties in the contract); Tiara Condo. Ass'n v. Marsh & McLennan Cos., 110 So. 3d 399, 401 (Fla. 2013) (reviewing on appeal the plaintiff's breach of contract and negligence claims against an insurance broker).

advantages.[87] Casting a claim under tort law provides at least three advantages over contract law.[88]

First, contract law generally limits a defendant's liability to damages that are reasonably foreseeable as a result of the breach of contractual duties.[89] On the other hand, tort law exposes defendants to liability for all damages proximately caused by the defendant's tort.[90] Thus, under a tort theory the plaintiff may be able to recover more damages.[91] For example, although punitive damages are generally not available in contract law, they are sometimes available in tort.[92] Second, a plaintiff may be able to bring a tort claim long after the statute of limitations has run on a plaintiff's contract claim[93] because the tort law statute of limitations usually begins to run only after the plaintiff knew or should have known of the injury.[94] Finally, the standard of proof to recover tort damages is less rigorous than the standard for contract claims.[95]

Given the advantages of tort law for plaintiffs, the economic loss rule serves a fundamental purpose to prevent "contract law [from drowning] in a sea of tort."[96] As discussed below, an important justification for the economic loss rule is to prevent plaintiffs from using tort law to circumvent the parties' bargain and allocation of duties and risks in their contract.[97]

B. The Origins of the Economic Loss Rule in American Jurisprudence

To understand how the economic loss rule is currently applied, it is helpful to examine the origins and development of the doctrine in American

87. SORENSEN ET AL., *supra* note 84.

88. *See infra* notes 89–95 and accompanying text.

89. SORENSEN ET AL., *supra* note 84.

90. *Id.*

91. *See id.*

92. *Compare* RESTATEMENT (SECOND) OF CONTRACTS § 355 (1981) ("Punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable."), *with* RESTATEMENT (SECOND) OF TORTS § 901 (1979) (permitting plaintiffs to recover damages "to punish wrongdoers and deter wrongful conduct").

93. Typically, the statute of limitations for a contract claim begins to run at the time the contract is breached, irrespective of whether the aggrieved party knew or should have known of the breach. *See* U.C.C. § 2-725(2) (2012).

94. *See* David G. Owen, *Special Defenses in Modern Products Liability Law*, 70 MO. L. REV. 1, 36 (2005) (noting that a majority of jurisdictions follow the discovery rule, which provides that "a cause of action accrues not when the plaintiff is injured but when the plaintiff discovers, or in the exercise of reasonable diligence should discover, pertinent facts about the injury").

95. *Compare* RESTATEMENT (SECOND) OF TORTS § 912 (requiring "as much certainty as the nature of the tort and the circumstances permit"), *with* RESTATEMENT (SECOND) OF CONTRACTS § 352 ("Damages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty.").

96. E. River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 866 (1986) ("It is clear, however, that if this development were allowed to progress too far, contract law would drown in a sea of tort."). See *infra* Part I.C. for a discussion of the boundary-line justification of the economic loss rule.

97. *See infra* Part I.C.

jurisprudence. This section examines the landmark decisions where the doctrine originated.

1. The Economic Loss Rule Is Created from Products Liability

The economic loss rule originated in the 1965 California Supreme Court products liability case *Seely v. White Motor Co*.[98] The plaintiff purchased a truck from the defendant for his heavy-duty hauling business.[99] Upon acquiring the truck, the plaintiff found that the vehicle bounced violently.[100] Eleven months after purchasing the truck, the plaintiff was slowing down for a turn when he discovered that the brakes did not work.[101] The truck overturned, but the plaintiff was not injured.[102] Due to the inability to use his truck, the plaintiff's business operations were disrupted, and as a result he incurred a loss of profit.[103] The plaintiff brought suit against the dealer and the truck manufacturer asserting breach of express warranty and strict products liability claims to recover economic loss for the repair of his truck and his lost profits.[104]

The California Supreme Court determined that the plaintiff was entitled to recover damages for lost profits and the plaintiff's purchase price of the truck under breach of an express warranty.[105] However, the court noted that had the defendant not warranted the truck, the plaintiff would not have been permitted to recover damages under the warranty.[106] It is only the defendant's agreement with the plaintiff that permitted recovery for economic loss.[107]

Significantly, the court also stated that the plaintiff could not recover damages for economic loss based on the strict products liability claim.[108] In doing so, the California Supreme Court explicitly rejected the New Jersey Supreme Court's holding in *Santor v. A & M Karagheusian, Inc.*,[109] which permitted a consumer to bring a strict products liability claim against a manufacturer for a defective product, even though the plaintiff's only damage was the product's loss of value.[110] Therefore, the California

98. 403 P.2d 145 (Cal. 1965).
99. *Id.* at 147.
100. *Id.*
101. *Id.*
102. *Id.*
103. *See id.* at 147–48.
104. *See id.*
105. *Id.* at 148. The plaintiff was entitled to recover $9240.40 for lost profits and $11,659.44 for the payments he made on the truck. *Id.* However, the plaintiff's claim to recover the cost of repair was denied since the trial court found that the plaintiff had not proved that the bouncing of the truck caused the accident. *Id.*
106. *Id.* at 150 (noting that the defendant "is responsible for these losses only because it warranted the truck to be 'free from defects in material and workmanship under normal use and service'").
107. *Id.* at 151 ("Defendant is liable only because of its agreement as defined by its continuing practice over eleven months. Without an agreement, defined by practice or otherwise, defendant should not be liable for these commercial losses.").
108. *Id.*
109. 207 A.2d 305 (N.J. 1965).
110. *Seely*, 403 P.2d at 151.

Supreme Court established the economic loss rule by barring the plaintiff's claim of strict products liability to recover purely economic loss caused by a defective product.[111]

2. The U.S. Supreme Court Adopts the Economic Loss Rule

The economic loss rule gained widespread acceptance when, twenty-one years after *Seely*, the Supreme Court decided *East River Steamship Corp. v. Transamerica Delaval Inc.*[112] The Court applied admiralty law to hold that "whether stated in negligence or strict liability, no products-liability claim lies in admiralty when the only injury claimed is economic loss."[113] The case arose after a shipbuilder contracted with Transamerica Delaval to design, manufacture, and install turbines that would serve as the propulsion units for four oil-transporting supertankers.[114] The plaintiffs then chartered the supertankers.[115] After being put into service, the turbines on each of the supertankers malfunctioned due to design and manufacturing defects.[116] Purely economic loss resulted since only the products themselves were damaged.[117] The plaintiffs filed suit based on a tort theory for products liability and sought damages for the cost of repair of the supertankers and the income lost when the ships were out of service.[118]

The Court focused on whether the plaintiffs could bring a claim based on a tort cause of action when a defective product purchased in a commercial transaction causes purely economic loss or whether such injury is the type of harm that should be remedied under contract law.[119] The Court adopted an approach similar to *Seely* and held that "a manufacturer in a commercial relationship has no duty under either a negligence or strict products-liability theory to prevent a product from injuring itself."[120] The Court noted that contract law, specifically the law of warranty, is the appropriate remedy to resolve this type of commercial controversy because the parties may bargain for the terms they agree to include in their contract.[121] In addition, a manufacturer may limit its liability by disclaiming warranties or restricting remedies.[122] The Court expressed concern that "contract law would drown in a sea of tort" if such claims were permitted to be brought under products liability theories instead of the law of warranty.[123]

111. *See id.* ("Even in actions for negligence, a manufacturer's liability is limited to damages for physical injuries and there is no recovery for economic loss alone.").
112. 476 U.S. 858 (1986); Fox & Loftus, *supra* note 7, at 261.
113. *E. River*, 476 U.S. at 876.
114. *Id.* at 859.
115. *Id.* at 859–60.
116. *Id.* at 860–61.
117. *Id.* at 861.
118. *Id.*
119. *Id.* at 859. ("[C]harting a course between products liability and contract law, we must determine whether injury to a product itself is the kind of harm that should be protected by products liability or left entirely to the law of contracts.").
120. *Id.* at 871.
121. *Id.* at 872–73.
122. *Id.* at 873.
123. *Id.* at 866.

Therefore, the Court prohibited the plaintiffs' claims to recover purely economic loss based on the tort theory of products liability.[124]

C. The Role of Contracts in Applying the Economic Loss Rule

For purposes of this Note, application of the economic loss rule entails two inquiries: (1) whether a plaintiff may recover purely economic losses caused by a defective product under a tort cause of action; and (2) whether a plaintiff may recover purely economic losses based on a tort theory when the parties bargain for the allocation of economic loss in their contract. As previously discussed, a majority of jurisdictions answer the first inquiry in the negative, absent any physical injury or property damage.[125] This section, therefore, focuses on the second inquiry concerning the role of contracts in applying the economic loss rule. First, it examines a principal justification for why the economic loss rule is used in the contractual privity context. Then, it discusses the consequences of failing to adhere to that principal justification. Finally, it provides a brief introduction to the independent duty rule.

1. The Boundary-Line Justification: Protecting the Boundary Line Between the Law of Torts and the Law of Contracts

A principal justification for the economic loss rule is to protect the boundary line between tort law and contract law.[126] This is known as the boundary-line justification.[127] According to this rationale, the underlying purpose of the economic loss rule is to maintain and enforce the "fundamental boundaries of tort and contract law" in circumstances where both tort and contract theories are implicated.[128]

The boundary-line justification can be clearly seen in the products liability context.[129] When a product injures only itself, it is understood as a warranty claim because such harm simply means that the product has failed to meet the consumer's expectations.[130] The quality and value of the

124. *Id.* at 876.

125. *See id.* at 868 (noting that *Seely* established the economic loss rule in products liability which is the approach followed by a majority of jurisdictions); *see also* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 21 cmt. d (1998); Johnson, *supra* note 7, at 526.

126. *See* Seely v. White Motor Co., 403 P.2d 145, 151 (Cal. 1965) ("The distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the 'luck' of one plaintiff in having an accident causing physical injury."); Johnson, *supra* note 7, at 546.

127. Johnson, *supra* note 7, at 546.

128. *E. River*, 476 U.S. at 871 ("When a product injures only itself the reasons for imposing a tort duty are weak and those for leaving the party to its contractual remedies are strong."); Alejandre v. Bull, 153 P.3d 864, 867 (Wash. 2007) ("The economic loss rule applies to hold parties to their contract remedies when a loss potentially implicates both tort and contract relief."); Johnson, *supra* note 7, at 546.

129. Johnson, *supra* note 7, at 549.

130. *E. River*, 476 U.S. at 872.

product is "precisely the purpose of express and implied warranties."[131] Therefore, a claim to recover economic harm from a defective product should be brought as a breach of warranty action.[132] These types of claims for economic harm are outside the realm of tort law because tort law, particularly strict products liability, is concerned with deterring manufacturers from making dangerous products that actually cause physical injury or property damage.[133] On the other hand, contract law is concerned with holding parties to their terms and remedying purely economic loss.[134] The economic loss rule can be said to maintain the boundary that separates tort law from contract law by precluding plaintiffs from advancing tort[135] theories to recover damages for economic loss alone.[136] Instead, the plaintiff must recover his or her economic loss through contract remedies, if any.[137]

Although the boundary-line justification is well established in the products liability context, the rationale is also pertinent in non-products liability cases, especially between commercial parties who bargain for the allocation of duties and risks in their contract.[138] Such a situation arose in *Grynberg v. Agri Tech, Inc*.[139] The Grynbergs invested approximately $95 million for 135,000 cattle, which they entrusted to Agri Tech to care for and feed.[140] The agreement provided that Agri Tech would "accept and care for cattle belonging to [the Grynbergs] in accordance with the customary standards of care, responsibility, and good animal husbandry."[141] The Grynbergs became dissatisfied with their investment returns, and sued Agri

131. *Id.*; U.C.C. § 2-313 (2012) (express warranty); *id.* § 2-314 (implied warranty of merchantability); *id.* § 2-315 (warranty of fitness for a particular purpose).

132. *E. River*, 476 U.S. at 872.

133. *See id.* at 870 ("[S]ince by definition no person or other property is damaged, the resulting loss is purely economic. Even when the harm to the product itself occurs through an abrupt, accident-like event, the resulting loss due to repair costs, decreased value, and lost profits is essentially the failure of the purchaser to receive the benefit of its bargain—traditionally the core concern of contract law."); *see also* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 1 cmt. d (1998).

134. *E. River*, 476 U.S. at 872–73 ("Contract law, and the law of warranty in particular, is well suited to commercial controversies of the sort involved in this case because the parties may set the terms of their own agreements.").

135. The broad term "tort" is used to show that generally a principal justification behind the economic loss rule is to protect the boundary-line between tort law and contract law. *See* Johnson, *supra* note 7, at 546. However, many jurisdictions recognize exceptions for torts such as fraud, negligent misrepresentation, and defamation, which are primarily about economic harm. *See* Johnson, *supra* note 7, at 529–34.

136. *See* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 21 cmt. a ("[P]roducts liability law lies at the boundary between tort and contract. Some categories of loss, including those often referred to as 'pure economic loss,' are more appropriately assigned to contract law and the remedies set forth in Articles 2 and 2A of the Uniform Commercial Code."); Johnson, *supra* note 7, at 546–47.

137. *See* Johnson, *supra* note 7, at 546–49.

138. *See generally* Grynberg v. Agri Tech, Inc., 10 P.3d 1267 (Colo. 2000); *see also* Johnson, *supra* note 7, at 546–49.

139. 10 P.3d 1267 (Colo. 2000); *see* SORENSEN ET AL., *supra* note 84.

140. *Grynberg*, 10 P.3d at 1268.

141. *Id.*

Tech based on, among other claims, negligence and breach of contract.[142] At trial, the jury found for the Grynbergs on their negligence claim but found in favor of Agri Tech on the contract claim.[143] On appeal, however, the Colorado Supreme Court held that the economic loss rule barred the Grynbergs from recovering on their negligence claim: "This is a classic example of a case where the plaintiffs are seeking to recover damages for the loss of their bargain with defendants . . . . An action to recover damages for the loss of a bargain is the exclusive province of contract law."[144] Thus, where a breaching party fails to perform under the agreed upon terms of the contract and causes the aggrieved party to assert causes of action in tort and contract based on the same governing facts, the economic loss rule is generally applied to bar the tort claim and protect the bargain made between the contracting parties.[145]

As exemplified by *Grynberg*, the boundary-line justification is especially relevant where the parties are in contractual privity and have bargained for specific terms in their contract.[146] In such circumstances, economic loss should be remedied under contract law, not tort law, because parties having negotiated for specific terms generally should be held to their bargain.[147] Parties to a contract have the opportunity to bargain for the allocation of risk by imposing obligations on one another and setting their own terms.[148] Restricting recovery for economic loss to those within the contemplation of the parties encourages parties to confidently allocate the risks of economic losses during the bargaining process without fear that their negotiations will be negated.[149] Therefore, a party who wishes to be remedied if they incur economic harm must bargain for it.[150] Some courts have even stated that it is not necessary for a risk of economic loss to be expressly represented in a contract before a tort claim to recover that loss will be barred under the economic loss rule.[151] It is enough that the parties *could have* accounted for

142. *Id.* at 1268–69.

143. *Id.* at 1269.

144. *Id.* at 1270.

145. *See id.*; *see also* SORENSEN ET AL., *supra* note 84.

146. *See Grynberg*, 10 P.3d at 1267; *see also* Craig K. Lawler, *Independent Duties and Colorado's Economic Loss Rule—Part I*, COLO. LAW., Jan. 2006, at 23 ("At the heart of the economic loss rule is the model of 'perfect bargaining': two sophisticated parties bargaining at arm's length to allocate risk and loss in contract. When these conditions are present, Colorado courts give priority to the contract-based policies of the economic loss rule and therefore hold parties exclusively to contract remedies.").

147. *See* Johnson, *supra* note 7, at 546–47.

148. *See* Detroit Edison Co. v. NABCO, Inc., 35 F.3d 236, 239 (6th Cir. 1994) ("The essence of contract law is the bargain: parties of equivalent bargaining power negotiate the terms of the transaction and each is then entitled to the benefit of the bargain."); Johnson, *supra* note 7, at 546–47.

149. *See* Vanderbeek v. Vernon Corp., 50 P.3d 866, 871 (Colo. 2002) ("[P]arties must be able to confidently allocate risks and costs during their bargaining without fear that unanticipated liability may arise in the future, effectively negating the parties' efforts to build these cost considerations into the contract.").

150. Johnson, *supra* note 7, at 547.

151. *See e.g.*, Springfield Hydroelectric Co. v. Copp, 779 A.2d 67, 70 (Vt. 2001) ("Contract principles, on the other hand, are generally more appropriate for determining claims for consequential damages that the parties have, or could have, addressed in their

the risk of such loss.[152] As such, courts have applied the economic loss rule to preclude plaintiffs who had the opportunity to bargain for the allocation of risk of economic harm from asserting tort theories to recover for their economic loss.[153]

2. Failing to Protect the Boundary Line: Drowning in a Sea of Tort

Several courts have recognized the consequences of not policing the boundary line between tort law and contract law.[154] Allowing tort and contract remedies to overlap would cause "certainty and predictability in allocating risk [to] decrease and impede future business activity."[155] Furthermore, permitting tort liability to expand to include purely economic damages would cause parties to be exposed to "liability in an indeterminate amount for an indeterminate time to an indeterminate class."[156] The Supreme Court has even asserted that "if this development were allowed to progress too far, contract law would drown in a sea of tort."[157]

3. Independent Duties Separate and Apart from the Contract

In articulating the economic loss rule, some courts have focused on the source of the duty allegedly violated.[158] These courts hold that the economic loss rule does not apply to bar tort claims for economic harm if the defendant breached a duty that was independent of the contract.[159] For example, the Supreme Court of South Carolina has stated: "[T]he question

agreement." (quoting Spring Motors Distribs. v. Ford Motor Co., 489 A.2d 660, 672 (N.J. 1985))); Alejandre v. Bull, 153 P.3d 864, 866 (Wash. 2007) ("There is no requirement that a risk of loss must be expressly allocated in a contract before a tort claim based on that loss will be precluded under the economic loss rule."); *see also* 3 DOBBS ET AL., *supra* note 17, § 515 ("Some courts have gone much, much further, refusing to entertain tort claims when the plaintiff could have but did not actually contract about a matter.").

152. *Springfield Hydroelectric*, 779 A.2d at 70; *Alejandre*, 153 P.3d at 866; 3 DOBBS ET AL., *supra* note 17, § 515.

153. *Springfield Hydroelectric*, 779 A.2d at 70; *Alejandre*, 153 P.3d at 866; 3 DOBBS ET AL., *supra* note 17, § 515.

154. *See infra* notes 155–57 and accompanying text.

155. *Alejandre*, 153 P.3d at 868.

156. *Id.* at 868 (quoting Ultramares Corp. v. Touche, 174 N.E. 441, 444 (N.Y. 1931)); *see also* E. River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 874 (1986) ("Permitting recovery for all foreseeable claims for purely economic loss could make a manufacturer liable for vast sums. It would be difficult for a manufacturer to take into account the expectations of persons downstream who may encounter its product. In this case, for example, if the charterers—already one step removed from the transaction—were permitted to recover their economic losses, then the companies that subchartered the ships might claim their economic losses from the delays, and the charterers' customers also might claim their economic losses, and so on.").

157. *E. River*, 476 U.S. at 866.

158. Johnson, *supra* note 7, at 566; *see infra* notes 160–74 and accompanying text.

159. A.C. Excavating v. Yacht Club II Homeowners Ass'n, 114 P.3d 862, 866 (Colo. 2005); Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc., 463 S.E.2d 85, 88 (S.C. 1995) ("In most instances, a negligence action will not lie when the parties are in privity of contract. When, however, there is a special relationship between the alleged tortfeasor and the injured party not arising in contract, the breach of that duty of care will support a tort action.").

of whether the plaintiff may maintain an action in tort for purely economic loss turns on the determination of the source of the duty plaintiff claims the defendant owed."[160] If a breach of duty arises under a contract between the parties, any action to recover economic harm must be remedied under contract, not tort law.[161] However, where the breach of duty arises independently of any contract duties between the parties, an action may be brought in tort law.[162]

The Colorado Supreme Court has also adopted a similar approach to applying the economic loss rule: "Where there exists a duty of care independent of any contractual obligations, the economic loss rule has no application and does not bar a plaintiff's tort claim because the claim is based on a recognized independent duty of care and thus falls outside the scope of the [doctrine]."[163] In other words, the economic loss rule is applied if the only breach is a breach of contractual duty;[164] however, where the breach arises independently of any contractual duty between the parties, the economic loss rule is not applied.[165]

An independent duty of care may occur when the duty did not arise out of the contract and is not intertwined with a contractual duty of performance.[166] For the tort duty to be actionable, it therefore must be separate from the contract.[167] A professional malpractice claim is an example.[168] In such a case, a contract creates a special relationship between the parties and the duties arising from the relationship may be enforced in tort.[169]

Florida courts had also followed a contractual privity form of the economic loss rule before the state's highest court rendered its decision in *Tiara* and held that the economic loss rule applied exclusively in the products liability context.[170] In determining whether a duty is independent of the contract, the Florida courts generally turned to the terms of the contract bargained for by the parties.[171] If the express terms of the contract (and in some Florida jurisdictions the opportunity to bargain for terms), addressed or incorporated a certain duty, it arguably was not independent.[172] However, if the plaintiff could show that the defendant owed a duty separate from the contract that as a matter of public policy

160. *Tommy L. Griffin Plumbing*, 463 S.E.2d at 88.
161. *Id.*
162. *Id.*
163. *A.C. Excavating*, 114 P.3d at 866.
164. *See id.*
165. *See id.*
166. *See* 3 DOBBS ET AL., *supra* note 17, § 652.
167. *See id.*
168. *See id.* § 653.
169. *Id.* §§ 652–53.
170. Tiara Condo. Ass'n v. Marsh & McLennan Cos., 110 So. 3d 399, 402–04 (Fla. 2013).
171. *See id.*
172. *See id.*

cannot be contracted away, then the plaintiff may have had a cause of action based in tort law.[173]

II. EXPAND OR CONTRACT?: FLORIDA STRUGGLES TO DEFINE THE LIMIT OF THE ECONOMIC LOSS RULE

As Part I discussed, the economic loss rule is a broad rule under which various applications exist. This part examines the various applications of the doctrine in Florida case law, Florida's expansion of the rule beyond the realm of products liability, and the Florida Supreme Court's concern of an expansive doctrine, ultimately prompting the court to contract the application of the rule exclusively to products liability. Part II.A discusses the development and expansion of the economic loss rule in Florida case law prior to *Tiara*. Part II.B examines the Florida Supreme Court's concern with an expansive doctrine. Finally, Part II.C. looks at *Tiara*, which restricts application of the doctrine based solely on whether the case involves a defective product.

A. The Development and Expansion of the Economic Loss Rule in Florida

This section focuses on the adoption, development, and expansion of the economic loss rule in the State of Florida. To understand Florida's decision to roll back the economic loss rule exclusively in the products liability context, it is helpful to trace Florida's development of the doctrine before the state's highest court rendered its decision in *Tiara*. First, this section discusses Florida's adoption of the economic loss rule in products liability. Second, it examines the expansion of Florida's application of the doctrine in non-products liability, specifically in the context of services. Lastly, it looks at how contractual privity affected the state's application of the doctrine.

1. Florida Establishes the Economic Loss Rule in Products Liability

The Florida Supreme Court adopted its initial version of the economic loss rule in the seminal case of *Florida Power & Light Co. v. Westinghouse Electric Corp.*[174] Florida Power & Light contracted with Westinghouse to

173. *See id.*

174. 510 So. 2d 899 (Fla. 1987). Although the Florida Supreme Court did not specifically address the economic loss rule until 1987, some Florida district courts of appeal were already employing the doctrine to preclude recovery for pure economic loss in products liability cases. *See, e.g.*, GAF Corp. v. Zack Co., 445 So. 2d 350, 351 (Fla. Dist. Ct. App. 1984) (holding in a defective products case that "the law of torts affords no cause of action for the plaintiff . . . to recover for its purely economic losses in this case"); Cedars of Leb. Hosp. Corp. v. European X-Ray Distribs. of Am., Inc., 444 So. 2d 1068, 1072 (Fla. Dist. Ct. App. 1984) (precluding a hospital's claim for strict products liability to recover its economic loss caused by defective x-ray equipment); Monsanto Agric. Prods. Co. v. Edenfield, 426 So. 2d 574, 576 (Fla. Dist. Ct. App. 1982) (prohibiting plaintiff from bringing a negligence claim when herbicides failed to perform as expected and stating that tort law does not recognize a duty to manufacture only products that meet the economic expectations of consumers, but recognizing such duty under contract law where the manufacturer assumes the duty as part of his bargain with the purchaser).

purchase two nuclear steam supply systems, including six steam generators.[175] After allegedly discovering leaks in the six steam generators, Florida Power & Light sued Westinghouse, claiming that Westinghouse was liable for negligence and breach of express warranties in the contract.[176] Florida Power & Light sought damages for, among other things, the cost of repair and inspection of the steam generators.[177]

The Southern District of Florida denied Westinghouse's motion for partial summary judgment on the breach of warranty claim.[178] However, the trial court granted Westinghouse's motion for partial summary judgment on the negligence claim, concluding that Florida law bars recovery of economic loss without any claim of personal injury or other property damage.[179]

On appeal, the Eleventh Circuit certified two questions to the Florida Supreme Court:

> (1) Whether Florida law permits a buyer under a contract for goods to recover economic losses in tort without a claim for personal injury or property damage to property other than the allegedly defective goods.
>
> (2) If Florida law precludes recovery for economic loss in tort without a claim for personal injury or property damage to other property, whether this rule should be applied retroactively in this case.[180]

The Florida Supreme Court answered the first question in the negative.[181] It relied primarily on *East River*, *Seely*, and three Florida district court of appeal cases[182] to hold that contract principles are better suited than tort principles to remedy purely economic loss.[183] Thus, the court, quoting the reasoning in *Seely*, agreed with Westinghouse that the majority approach in the United States bars recovery of economic damages based on a tort cause of action where there is no property damage or personal injury.[184] Furthermore, the court reiterated the proposition in *East River* that in a commercial relationship, "a manufacturer . . . has no duty under either a negligence or strict products liability theory to prevent a product from injuring itself."[185] The court concluded that economic risks, such as product value and quality, should be negotiated between parties to a

175. Fla. Power & Light Co. v. Westinghouse Electric Corp., 785 F.2d 952, 953 (11th Cir. 1986).
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.*
181. Fla. Power & Light Co. v. Westinghouse Electric Corp., 510 So. 2d 899, 900 (Fla. 1987).
182. *See supra* note 174.
183. *Westinghouse*, 510 So. 2d at 902.
184. *Id.* at 900–02.
185. *Id.* at 901 (quoting E. River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 871 (1986)).

contract.[186] Thus, warranty law should control any claims for purely economic loss asserted by a party to a contract.[187]

In answering the second question (whether the economic loss rule should be applied retroactively in the instant case), the court stated that the economic loss rule "is not a new principle of law in Florida."[188] Rather, "the economic loss rule has a long, historic basis originating with the privity doctrine, which precluded recovery of economic losses outside a contractual setting."[189] Therefore, the court held that the economic loss rule should be applied to the instant case not retroactively, but as a matter of existing law.[190]

2. Florida Expands the Scope of the Economic Loss Rule to Non-Products Liability

Three months after the Florida Supreme Court rendered its decision in *Westinghouse*, the court decided *AFM Corp. v. Southern Bell Telephone & Telegraph Co.*,[191] where it applied the economic loss rule to preclude a purchaser of services from recovering economic loss in negligence.[192] AFM contracted with Southern Bell for advertising services in the yellow pages.[193] At the time of the contract, AFM was considering moving its office.[194] However, such a move would cause significantly higher toll charges.[195] As a result, Southern Bell agreed that if AFM moved and changed its phone number, it would provide a referral service to avoid the higher toll charges.[196] Thus, in the event callers telephoned AFM's old number, they would be referred to their new number by a taped voice.[197] The problem began when the yellow pages were distributed with AFM's old number.[198] Furthermore, Southern Bell issued AFM's old number to another customer, which caused a disconnection with the referral service.[199]

186. *Id.* The parties to the contract were commercial entities engaged in a large commercial transaction. *Id.* at 902. It is unclear whether the court's holding would have been different had one party to the contract been a consumer. Nevertheless, such inquiry is beyond the scope of this Note, as this Note argues for application of the economic loss rule in a context similar to *Westinghouse*.

187. *Id.* at 901.

188. *Id.* at 902. Although not explicitly stated, the court seems to be referencing the three decisions of the district courts of appeal. However, this case is the first time that Florida's highest court articulated its adoption of the economic loss rule. *See supra* note 174 and accompanying text.

189. *Westinghouse*, 510 So. 2d at 902.

190. *See id.*

191. 515 So. 2d 180 (Fla. 1987).

192. *Id.* at 181–82.

193. AFM Corp. v. S. Bell Tel. & Tel. Co., 796 F.2d 1467, 1468 (11th Cir. 1986).

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

The connection to the referral service was eventually reestablished; however, it was later mistakenly disconnected a second time.[200]

AFM filed suit against Southern Bell based on negligence and breach of contract and sought damages for its purely economic losses.[201] At the trial, AFM offered evidence that the referral service Southern Bell had agreed to provide had been prematurely disconnected.[202] AFM also produced expert testimony that showed it lost $21,800 in profits because of Southern Bell's failure to properly maintain the referral service.[203] After AFM had introduced all of its evidence, AFM's counsel decided to withdraw all of the contract claims and proceed only on its negligence claim.[204]

The jury returned a verdict for AFM, awarding the company both compensatory and punitive damages.[205] Southern Bell appealed after the trial court denied its motions for judgment notwithstanding the verdict and in the alternative a motion for a new trial.[206]

On appeal, the Eleventh Circuit certified three questions[207] to the Florida Supreme Court, which consolidated the questions into one: "Does Florida permit a purchaser of services to recover economic losses in tort without a claim for personal injury or property damage?"[208] The court answered the question in the negative, thereby expanding its holding in *Westinghouse* to include services.[209]

In reaching its decision, the court noted the obvious distinction between *Westinghouse*, where the court responded to a certified question concerning the purchase of goods, and the instant case, which involved the purchase of services.[210] The court also emphasized that the contract between AFM and Southern Bell "defined the limitation of liability through bargaining, risk acceptance, and compensation."[211] Therefore, the court stated that there must be a tort independent of the breach of contract to recover in

200. *Id.*
201. *Id.* AFM initially filed its lawsuit against Southern Bell in a Florida state court, asserting claims for both negligence and breach of contract. *Id.* The case was later removed to the Southern District of Florida. *Id.*
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.*
207. The three questions certified by the Eleventh Circuit were:

> (1) Can a plaintiff suing exclusively in tort recover lost profits?
> If the answer to question 1 is yes,
> (2) Can negligent or willful breach of contract alone
> constitute an independent tort?
> If the answer to question 2 is yes,
> (3) Can such a tort be the basis of an award of punitive damages if the other criteria for awarding punitive damages are met?

Id. at 1469.
208. AFM Corp. v. S. Bell Tel. & Tel. Co., 515 So. 2d 180, 180 (Fla. 1987).
209. *Id.*
210. *See id.*
211. *Id.* at 181.

negligence.[212] AFM failed to prove that its negligence claim was distinct from the breach of contract.[213] Therefore, the court concluded "that without some conduct resulting in personal injury or property damage, there can be no independent tort flowing from a contractual breach which would justify a tort claim solely for economic losses."[214]

In rendering its decision, the court addressed a seeming inconsistency with its holding in a prior case, *A.R. Moyer, Inc. v. Graham*.[215] In *Moyer*, the court allowed the plaintiff to recover purely economic losses based on a negligence theory even though the plaintiff did not suffer any personal injury or property damage.[216] The court, however, did not overrule *Moyer*, but distinguished the case by asserting that the *Moyer* plaintiff was not a party to or third-party beneficiary of the contract with the defendant.[217] Thus, since the plaintiff in *Moyer* did not have a contract under which he could recover his loss, unlike the plaintiff in *AFM*, the court permitted recovery for economic losses.[218]

Westinghouse, *AFM*, and *Moyer* seemed to suggest that the economic loss rule applied where the parties were in contractual privity, allowing the parties to negotiate and allocate risks.[219] However, six years later the Florida Supreme Court held that the economic loss rule applied regardless of whether the parties are in contractual privity in *Casa Clara Condominium Ass'n v. Charley Toppino & Sons, Inc*.[220]

3. Florida Applies the Economic Loss Rule Regardless of Contractual Privity

After expanding the economic loss rule to cover services in *AFM*, the Florida Supreme Court established that the doctrine would apply irrespective of whether the parties were in contractual privity.[221] In *Casa*

---

212. *Id.*

213. *Id.*

214. *Id.* at 181–82.

215. 285 So. 2d 397 (Fla. 1973). In *Moyer*, the Florida Supreme Court answered the certified question of whether a general contractor could sue a supervising architect or engineer for negligent preparation of plans when the architect or engineer was not in direct privity with the general contractor. *Id.* at 398.

216. *AFM*, 515 So. 2d at 181.

217. *Id.*

218. *Id.* In addition, to the lack of a contract under which the general contractor could recover, pivotal to the court's decision was the supervisory nature of the relationship between the architect and the general contractor. *Id.* As the court stated:

> We based our decision on the fact that the supervisory responsibilities vested in the architect carried with it a concurrent duty not to injure foreseeable parties not beneficiaries of the contract. We declined in that case to find a basis for the negligence claim under the contract itself, absent a clear intent manifested in the contract. Since there was no contract under which the general contractor could recover his loss, we concluded he did have a cause of action in tort.

Id.

219. *See id.* at 181; Fla. Power & Light v. Westinghouse Electric Corp., 510 So. 2d 899 (Fla. 1987).

220. 620 So. 2d 1244 (Fla. 1993).

221. *See id.* at 1248.

Clara, the court was presented with the issue of whether homeowners could recover for purely economic losses from a concrete supplier based on a negligence theory.[222] The homeowners owned condominium units and small homes that were built using concrete supplied by Charley Toppino & Sons, Inc.[223] The homeowners alleged that the concrete was defective and as a result had damaged their homes.[224] They brought suit against Toppino for breach of implied warranty, products liability, negligence, and violation of the building code.[225]

Relying on its prior decisions, the court stated that contract law was more appropriate than tort law for recovering economic loss without any physical injury or property damage.[226] The court explained that the homeowners suffered an "economic disappointment" since the home failed to meet their expectations.[227] Noting that there are protections[228] for purchasers of homes, the court stated that the protections must be "sufficient when compared with the mischief that could be caused by allowing tort recovery for purely economic losses."[229] Therefore, the court applied the economic loss rule even though the homeowners and Toppino were not in contractual privity.[230]

B. Concerns of an Expansive Application of the Economic Loss Rule

According to *Westinghouse*, *AFM*, and *Casa Clara*, the Florida economic loss rule provides that generally, principles of contract law, not tort law, are the appropriate means to remedy claims of economic loss where there is no physical injury or property damage.[231] Following these three cases, the Florida Supreme Court expressed concern that the economic loss rule had

222. *Id.* at 1245.

223. *Id.* The homeowners lacked contractual privity with Toppino since they purchased their homes from developers who purchased the concrete from Toppino. *See id.* at 1248 (Barkett, J., concurring).

224. *Id.* at 1245 (majority opinion). Allegedly, the concrete contained too much salt, which caused the steel in the concrete to rust and crack. *Id.*

225. *Id.*

226. *Id.* at 1247. The court further rejected the homeowners' suggestion that the defective concrete caused property damage other than to the product itself. *Id.* The homeowners contended that the products they purchased were the separate items of building material, rather than the homes themselves. *Id.* The court disagreed, stating that the homeowners bargained for and purchased the completed homes, not the separate materials used to build those homes. *Id.* The concrete was an essential part of the finished product and did not harm property other than the product itself. *Id.*

227. *Id.*

228. The court noted that protections for homebuyers include statutory warranties, the warranty of habitability, the duty of sellers to disclose known defects, ability of purchasers to inspect houses for defects, and the power to bargain over price. *Id.*

229. *Id.*

230. *See id.* at 1248.

231. *See id.* at 1247; AFM Corp. v. S. Bell Tel. & Tel. Co., 515 So. 2d 180, 181 (Fla. 1987); Fla. Power & Light Co. v. Westinghouse Electric Corp., 510 So. 2d 899, 902 (Fla. 1987).

become overly expansive.[232] For example, in *Moransais v. Heathman*[233] the court observed that the economic loss rule was intended to limit actions in the context of products liability.[234] In addition, in *Comptech International, Inc. v. Milam Commerce Park, Ltd.*,[235] the court noted the confusion surrounding the application of the rule and stated that "[h]ad the courts adhered to these requirements (a product, the product damaging itself, and economic losses), the confusion that has abounded in this area of the law would have been minimized."[236] The court went on to acknowledge that its pronouncements on the economic loss rule had been criticized.[237] Finally, in *Indemnity Insurance Co. of North America v. American Aviation, Inc.*[238] the court reiterated its concern with the over expansion of the economic loss rule and how several justices supported expressly limiting the economic loss rule to products liability cases.[239]

In *Moransais*, *Comptech*, and *American Aviation*, the Florida Supreme Court expressed its concern with the application of the economic loss rule and its desire to limit the rule in the products liability context.[240] However, despite the court's explicit concern, it did not restrict the scope of the economic loss rule.[241]

C. Returning the Economic Loss Rule to Its Roots

In 2013, the Florida Supreme Court took the "final step" and held that the economic loss rule applies exclusively in products liability cases.[242] This section examines the recent *Tiara* decision, the dissenting opinions, and what it may mean for future litigants.

---

232. *See* Tiara Condo. Ass'n v. Marsh & McLennan Cos., 110 So. 3d 399, 406 (Fla. 2013) ("For some time . . . this Court has been concerned with what it perceived as an over-expansion of the economic loss rule.").

233. 744 So. 2d 973 (Fla. 1999).

234. *Id.* at 983 ("[T]he rule was primarily intended to limit actions in the product liability context, and its application should generally be limited to those contexts or situations where the policy considerations are substantially identical to those underlying the product liability-type analysis.").

235. 753 So. 2d 1219 (Fla. 1999).

236. *Id.* at 1224.

237. *Id.* One Florida practitioner, Paul J. Schwiep, criticized the "confoundingly expanding legal doctrine" on a variety of bases and noted that "judges, lawyers, and commercial clients alike are all desperately struggling to define the parameters of the economic loss doctrine." Paul J. Schwiep, *The Economic Loss Rule Outbreak: The Monster That Ate Commercial Torts*, FLA. B.J., Nov. 1995, at 34.

238. 891 So. 2d 532 (Fla. 2004).

239. *Id.* at 542.

240. *See* Tiara Condo. Ass'n v. Marsh & McLennan Cos., 110 So. 3d 399, 407 (Fla. 2013) ("[I]n *Moransais*, *Comptech*, and *American Aviation*, this Court clearly expressed its desire to return the economic loss rule to its intended purpose—to limit actions in the products liability context.").

241. *See id.* at 407 ("[W]e left intact a number of exceptions that continue the rule's unprincipled expansion. We simply did not go far enough.").

242. *Id.* ("[W]e now take this final step and hold that the economic loss rule applies only in the products liability context. We thus recede from our prior rulings to the extent that they have applied the economic loss rule to cases other than products liability.").

1. Workable and Wise Only in Products Liability Cases

Retreating from years of precedent that applied the economic loss rule to a variety of contractual contexts, the Florida Supreme Court concluded that the doctrine applies exclusively in the products liability context.[243] The case involved an insurance broker retained by Tiara Condominium Association to obtain condominium insurance coverage.[244] The broker secured a policy for a loss limit of approximately $50 million.[245] As a result of two hurricanes, Tiara sustained significant losses as a result of the damage.[246] The insurance broker assured Tiara that the loss limit on the insurance coverage was per occurrence (which means that since there were two hurricanes, Tiara would be entitled to approximately $100 million, instead of the aggregate amount of $50 million), and so Tiara underwent costly remediation efforts.[247] However, when Tiara requested payment from the insurance company, it claimed that the loss limit was only $50 million in the aggregate and not per occurrence.[248] Tiara and the insurance company eventually settled for about $89 million.[249] However, Tiara had spent more than $100 million in its remediation efforts, and so it filed suit against the insurance broker alleging breach of contract, negligent misrepresentation, breach of the implied covenant of good faith and fair dealing, negligence, and breach of fiduciary duty.[250]

The Florida Supreme Court was faced with answering a certified question from the Eleventh Circuit.[251] The court rephrased the certified question as: "Does the economic loss rule bar an insured's suit against an insurance broker where the parties are in contractual privity with one another and the damages sought are solely for economic losses?"[252] Before answering the question in the negative and categorically holding that the economic loss rule is exclusively limited to products liability cases, the court first reviewed the history of the doctrine.[253]

The court divided its discussion by focusing on two types of circumstances where the economic loss rule had been applied: cases involving contractual privity and products liability cases.[254] The court noted that the contractual privity form of the economic loss rule is designed to preclude the parties from circumventing the bargain that they have made

243. *Id.*
244. *Id.* at 400.
245. *Id.*
246. *Id.*
247. *Id.*
248. *Id.*
249. *Id.*
250. *Id.*
251. *Id.*
252. *Id.* The Eleventh Circuit originally certified to the Florida Supreme Court the following question: "Does an insurance broker provide a 'professional service' such that the insurance broker is unable to successfully assert the economic loss rule as a bar to tort claims seeking economic damages that arise from the contractual relationship between the insurance broker and the insured?" *Id.*
253. *Id.* at 401–02.
254. *Id.* at 402–06.

to allocate risks and losses specified in their contract by bringing a tort claim for economic loss.[255] Under the contractual privity version, a plaintiff is barred from asserting tort actions to recover purely economic losses where the damages sought in tort are the same as those for the breach of contract.[256] In other words, a tort action is not viable where a defendant has not breached a duty separate and apart from the breach of contract.[257] The reason for precluding a plaintiff from asserting tort actions in such circumstances is because contract principles are "generally more appropriate for determining remedies for consequential damages that the parties have, or could have, addressed in their contractual agreement."[258]

After reviewing the application of the economic loss rule in contractual contexts, the majority opinion turned to the doctrine's origin and original purpose.[259] According to the court, since the economic loss rule originated in products liability, the doctrine's original intent was to bar tort claims solely in products liability cases.[260] The majority opinion reiterated its concern that the doctrine had created "a legacy of unprincipled expansion."[261] The court noted how it first articulated its concern with the expansion of the doctrine in *Moransais*, then in *Comptech*, and yet again five years later in *American Aviation*.[262] The court stated that it "simply did not go far enough" in those cases.[263] Recognizing that the expansion of the economic loss rule had become "unwise and unworkable in practice," the court limited the doctrine's application exclusively to products liability cases, receding from its use in the contractual privity context.[264] Therefore, the court answered the rephrased certified question in the negative, rendering the economic loss rule inapplicable to bar Tiara's tort claims.[265]

2. The Dissenting Opinions: Workable and Wise in Products Liability and Contractual Privity Cases

The two dissenting opinions questioned the use of the economic loss rule solely in the products liability context.[266] Justice Canady's dissent focused on the court's continuous application of the doctrine in contractual privity

255. *Id.* at 402.
256. *Id.*
257. *Id.*
258. *Id.*
259. *Id.* at 403–07.
260. *Id.* at 407. The concurring opinion also explained that the original intent of the economic loss rule applies only to products liability cases. *Id.* at 409 (Pariente, J., concurring) (stating that the economic loss rule is "a doctrine that arose in the torts context to serve a specific purpose—to curb potentially unbounded liability following the adoption of strict products liability").
261. *Id.* at 406 (majority opinion).
262. *Id.* at 406–07.
263. *Id.* at 407.
264. *Id.*
265. *Id.*
266. *See id.* at 410 (Polston, C.J., dissenting); *see also id.* at 411 (Canady, J., dissenting).

contexts to prevent "contract law from 'drown[ing] in a sea of tort.'"[267] The dissent noted that the underlying assumption of the economic loss rule is to prevent parties to a contract from circumventing the allocation of risk and losses specified in the contract by asserting an action to recover economic loss in tort.[268] According to Justice Canady's dissent, the majority failed to explain why the economic loss rule is workable and wise in the products liability context, but unworkable and unwise in the broader context of contract-based relationships.[269]

According to then-Chief Justice Polston's dissent, the court should have used its precedent to answer the original certified question from the Eleventh Circuit in the negative.[270] The initial certified question hinged on whether insurance brokers provided a "professional service."[271] If insurance brokers provided professional services, then the economic loss rule could not be applied to bar Tiara's tort claims.[272] Chief Justice Polston reasoned that under Florida case law insurance brokers do not provide professional services,[273] and therefore, the defendant/insurance broker may successfully assert the economic loss rule as a defense against tort liability.[274]

3. Barred or Not Barred?

According to Justice Pariente's concurring opinion, even though the contractual privity form of the economic loss rule provided an easy way to bar tort claims intertwined with breach of contract claims, "it is neither a necessary nor a principled mechanism for doing so."[275] If the defendant does not owe the plaintiff any duty apart from that created by the contract, the tort claim would fail under "basic contractual principles."[276] According to the concurring opinion, therefore, the *Tiara* decision will not have a substantial impact because it merely alters the means by which the court will dismiss alleged tort claims that arise in a contractual setting.[277] In other words, instead of relying on the economic loss rule to dismiss tort

267. *Id.* at 413 (Canady, J., dissenting) (quoting E. River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 866 (1986)).
268. *Id.* at 412.
269. *Id.* at 413.
270. *Id.* at 410 (Polston, C.J., dissenting).
271. *See id.*
272. *Id.* at 411.
273. *Id.* (reasoning that insurance agents, who are not considered "professional for purposes of the professional malpractice statute of limitations," are like insurance brokers and the definition of "professional" requires at least a four-year college degree, which is not necessary to become a licensed insurance broker).
274. *See id.* at 410–11.
275. *Id.* at 409 (Pariente, J., concurring).
276. *Id.* at 408–09.
277. *Id.* at 408 ("Our decision is neither a monumental upsetting of Florida law nor an expansion of tort law at the expense of contract principles. To the contrary, the majority merely clarifies that the economic loss rule was always intended to apply only to products liability cases.").

claims in contractual contexts, the court will employ "basic contractual principles."[278]

However, according to Chief Justice Polston's dissenting opinion, the majority's elimination of the use of the doctrine when the parties are in contractual privity "greatly expand[s] tort claims and remedies available without deference to contract claims."[279] Moreover, according to Justice Canady, by restricting the economic loss rule solely to the products liability context, the court "face[s] the prospect of every breach of contract claim being accompanied by a tort claim."[280] In other words, plaintiffs will attempt to bolster their amount of recoverable damages by asserting tort claims that ordinarily would have been barred under precedent prior to *Tiara*.[281]

III. REDEFINING THE LIMIT OF THE ECONOMIC LOSS RULE

As Part II has shown, Florida courts have struggled to define the limit of the economic loss rule. As a way to overcome this struggle, the Florida Supreme Court adopted a bright-line approach by limiting the scope of the doctrine exclusively to the products liability context. Part III of this Note argues that such a restriction of the doctrine is too narrow. This Note contends that the economic loss rule is not just for products liability and thus the limited scope of Florida's economic loss rule should be redefined to include contractual privity cases. Specifically, the economic loss rule should be applied in situations where sophisticated parties engage in arms-length negotiations, bargaining for the allocation of risk and loss in their contract. Part III.A argues that applying the economic loss rule pursuant to Florida's products liability rule does not protect the boundary line between

278. *Id.* at 409 ("The majority's decision . . . merely explains that it is common law principles of contract, rather than the economic loss rule, that [dismisses tort claims interconnected with breach of contract claims].").

279. *Id.* at 411 (Polston, C.J., dissenting).

280. *Id.* at 414 (Canady, J., dissenting).

281. *See id.* at 410 (Polston, C.J., dissenting). Chief Justice Polston's dissent contends that the majority's decision "make[s] available a wide arsenal of tort claims previously barred by the economic loss rule." *Id.* at 410 n.10. Among the types of cases that Chief Justice Polston cites as previously barred by the economic loss rule but now available as tort claims include: *Geico Casualty Co. v. Arce*, 333 F. App'x 396, 398 (11th Cir. 2009) (applying Florida's economic loss rule to bar civil conspiracy and intentional infliction of emotional distress claims arising out of a breach of an insurance policy); *Mount Sinai Medical Center of Greater Miami, Inc. v. Heidrick & Struggles, Inc.*, 188 F. App'x 966, 969 (11th Cir. 2006) (applying Florida's economic loss rule to bar fraudulent misrepresentation claims and holding that the hospital's remedy for alleged breach of search contract was for breach of contract, not a tort action); *Royal Surplus Lines Inc. v. Coachman Industries, Inc.*, 184 F. App'x 894, 902 (11th Cir. 2006) (applying Florida's economic loss rule to bar insurer's tort actions which were based on insured's failure to provide information under the terms of a contract); *Cessna Aircraft Co. v. Avior Technologies, Inc.*, 990 So. 2d 532, 538 (Fla. Dist. Ct. App. 2008) (barring negligence claim against aircraft repair company and holding plaintiffs were bound by the service agreement for the repairs and its limitation of damages provision); *Taylor v. Maness*, 941 So. 2d 559, 564 (Fla. Dist. Ct. App. 2006) (barring recovery for fraud in the inducement and negligent misrepresentation claims arising out of defendants alleged failure to perform under the contract). *Tiara*, 110 So. 3d 410 n.10 (Polston, C.J., dissenting).

tort law and contract law because it fails to protect the bargain for the allocation of economic loss made between sophisticated parties. Part III.B offers an approach to determine the application of the economic loss rule specifically where sophisticated parties bargain for the allocation of risk and economic loss in their contract. In such a context, the economic loss rule should always be applied, unless the contract says otherwise.

A. The Products Liability Rule Is Insufficient to Protect the Boundary Line Between Tort Law and Contract Law

Products liability cases are a clear way to understand the boundary-line justification: manufacturers should be held accountable under tort theories where their products cause physical harm or property damage because tort law is concerned with remedying such types of harm; on the other hand, where the defective product causes harm in the form of pure economic loss, manufacturers should not be held liable under tort law because such harm is more appropriately remedied through contract or warranty law.[282] Thus, courts apply the economic loss rule to preclude plaintiffs from recovering economic loss under a tort theory where the proper redress for such type of harm is the province of contract law.[283]

However, the question still remains if (and to what extent) the doctrine should be applied outside of the products liability context.[284] To a great extent, this question turns on the boundary-line justification.[285] Specifically, what does "tort law" mean when courts and legal authorities assert that a principle justification for the economic loss rule is to protect the boundary line between tort law and contract law?[286] Therefore, how broadly "tort law" is defined is crucial to determine the proper scope of the economic loss rule's application. A narrow reading of the boundary-line justification posits that the economic loss rule protects the boundary line between *products liability* law and contract law.[287] Under such a reading, the boundary-line justification does not protect *all* of tort law but rather a particular subset, i.e., products liability.[288] If this is the proper reading of the boundary-line function, it is easy to see how the economic loss rule should apply exclusively in products liability cases.[289]

On the other hand, if the boundary-line justification is defined broadly as a means to protect the boundary line between *tort law* and contract law, then it becomes more difficult to assert that the economic loss rule was intended to apply exclusively in products liability cases.[290] Even though the economic loss rule originated in the context of products liability, the

282. *See supra* notes 129–37 and accompanying text; *see also supra* Part I.A.2.a–b.
283. *See supra* notes 108–24 and accompanying text; *see also* Part I.A.4 (outlining the benefits of recovering economic losses through tort law as opposed to contract law).
284. *See supra* notes 16–19 and accompanying text.
285. *See supra* Part I.B.1.
286. *See supra* Part I.B.1.
287. *See supra* notes 260–66 and accompanying text.
288. *See supra* notes 260–66 and accompanying text.
289. *See supra* notes 260–65 and accompanying text.
290. *See supra* notes 138–53, 267–74 and accompanying text.

boundary-line justification should be interpreted so that the doctrine's scope is broader.[291] As articulated by the Colorado Supreme Court, underlying the necessity for the economic loss rule is the ability for parties to confidently allocate the costs and risks of economic losses in their bargain.[292] It should be irrelevant whether the case involves a defective product because the focus should be to protect the bargain made between the parties.[293] Part of the boundary-line justification is to respect the bargain for allocation of economic loss between parties.[294] If a person wishes to be protected from economic harm, he or she must bargain for protection and pay the price of securing those benefits.[295] In other words, the economic loss rule encourages parties to confidently allocate the costs and risks that may arise without fear that their efforts in the bargaining process will later be negated.[296] Moreover, the doctrine ensures respect for the bargaining process by preventing parties from asserting tort theories in their lawsuits to recoup economic losses, thereby voiding the careful decisions made during negotiations.[297]

Although this Note acknowledges that application of the economic loss rule in products liability is appropriate, it is inappropriate to restrict its application exclusively to cases that involve a defective product because it circumvents the allocation of economic loss that parties bargained for in their contract.[298] For example, suppose in negotiating terms for a contract involving services (or any non-products-related matter), two corporations of equal bargaining power negotiate for a specific remedy in the event one party sustains economic loss. The remedy says that in the event the purchaser of services suffers economic loss as a result of the seller's negligently rendered services, the purchaser may not assert any tort claims against the seller. Rather, the purchaser is limited to a $50,000 remedy. Suppose the purchaser suffers economic loss in the amount of $100,000 as a result of the seller's negligence in its performance of the contract. The purchaser sues the seller for breach of contract and negligence. Even though the parties specifically bargained for the allocation of economic loss, under Florida's products liability rule the purchaser is not barred by the economic loss rule from asserting its negligence claim.[299]

This, however, does not mean that the purchaser will recover the other $50,000.[300] This example is merely intended to show how Florida's products liability rule weakens the practical force of the economic loss

291. *See supra* notes 256–60 and accompanying text; *see also* Town of Alma v. AZCO Constr., Inc., 10 P.3d 1256, 1262 (Colo. 2000) ("Although originally born from products liability law, the application of the economic loss rule is broader, because it serves to maintain a distinction between contract and tort law.").

292. *Town of Alma*, 10 P.3d at 1262; *see supra* notes 144–46, 149 and accompanying text.

293. *See supra* notes 146–53, 267–69 and accompanying text.

294. *See supra* notes 146–53, 267–69 and accompanying text.

295. *See supra* notes 146–53 and accompanying text.

296. *See supra* notes 146–53 and accompanying text.

297. *See supra* notes 279–81 and accompanying text.

298. *See supra* notes 146–53, 268–69, 279–81 and accompanying text.

299. *See supra* notes 261–67, 281 and accompanying text.

300. *See supra* notes 275–78 and accompanying text.

rule.[301] In jurisdictions that follow Florida's lead, defendants may no longer rely on the economic loss rule as a means to protect against tort liability in non-products liability cases.[302]

In the example discussed above, this Note contends that, with respect to sophisticated parties, such claims should always be barred by the economic loss rule, unless the contract specified that such causes of action may be asserted. The idea is that sophisticated parties can be assumed to engage in perfect bargaining with equal bargaining power and levels of skill to carry out the negotiations.[303] If the corporation would like to be able to recover economic loss based on a tort theory, the corporation must bargain for it as a term of the contract.[304] Thus, this Note posits that absolute deference to the contract is the best way to respect the bargaining process for sophisticated parties, a standard further explored in the next section.[305]

B. Redefining the Limit to Include Sophisticated Parties in Contractual Privity

The economic loss rule's justification of preventing parties from circumventing the allocation of economic loss is arguably most necessary in situations where sophisticated parties to a contract negotiate in arms-length transactions, bargaining for the allocation of risk and economic loss in their contract.[306] In such circumstances, Florida courts should take a different approach by looking beyond the origins of the economic loss rule to the terms of the contract. This approach requires absolute deference to the contract, as outlined below.

If the contract specifies a remedy for economic loss and that no other remedy may be pursued, the plaintiff should recover only under that contractual remedy. If the contract is silent regarding the remedy for economic loss, then courts should apply the economic loss rule in the event that the plaintiff attempts to recoup economic loss under *any* type of tort cause of action.[307] Finally, if the defendant waives protection of the economic loss rule as a condition to the contract, courts should not assert the economic loss rule. In other words, in situations where the parties to a contract are sophisticated players who bargain (or could have bargained) for the allocation of economic loss, the economic loss rule should always apply, unless the contract says otherwise.

---

301. *See supra* notes 279–81 and accompanying text.
302. *See supra* notes 266, 279–81 and accompanying text.
303. *See supra* notes 146–48 and accompanying text.
304. *See supra* notes 148–53 and accompanying text.
305. *See infra* Part III.B.
306. *See supra* notes 144–57 and accompanying text.
307. As stated in Part I.C, the contractual privity form of the economic loss rule often does not apply where the defendant owes the plaintiff an independent duty separate from the contract. *See supra* notes 158–74 and accompanying text. However, under the framework advanced by this Note, the economic loss rule would apply in such instances. At the heart of this approach is strict deference to the contract but only with respect to sophisticated parties who negotiate in perfect or close to perfect bargaining conditions.

In determining whether the economic loss rule should be invoked in the context of contractual privity, the terms of the contract should be the most important factor that courts take into consideration, especially where the parties to a contract are sophisticated players on equal footing.[308] Although Florida courts previously considered the terms that parties to a contract bargained for when applying the economic loss rule,[309] this Note not only contends that Florida courts should return to a contractual privity form of the doctrine, but moreover, this Note is unique in that it argues for absolute deference to the contract in instances where sophisticated parties bargain at arm's length. In addition, where the plaintiff could have, but did not actually bargain for a particular matter, courts should treat such an instance as within the scope of the economic loss rule and refuse to entertain the plaintiff's tort claims.[310]

Although an approach where absolute deference to the contract governs application of the economic loss rule would place an extra burden on the courts to inquire into the relationship between the plaintiff and defendant, such an approach preserves the sanctity and integrity of the contract.[311] Furthermore, such an approach is needed to reinforce the boundary line between tort law and contract law so as to prevent sophisticated plaintiffs from circumventing the allocation of loss bargained for in their contract.[312]

CONCLUSION

The economic loss rule can be a valuable tool to permit or bar plaintiffs from recovering their economic losses under tort law. However, due to the differing views and approaches to applying the doctrine, it can also be confusing for courts and litigants to determine when the economic loss rule should be applied. This Note has attempted to resolve the confusion of applying the economic loss rule in a specific context: where sophisticated parties to a contract bargained (or could have bargained) for the allocation of risk and economic loss in their contract.

Despite its origins, the economic loss rule is not just for products liability. Rather, the doctrine serves a broader purpose to protect the boundary line between tort law and contract law. In circumstances where sophisticated parties to a contract bargained (or could have bargained) for the allocation of economic loss, the only relevant factor to determine whether the economic loss rule should apply is the contract itself. Florida courts should redefine the limit of the economic loss rule to include such circumstances and should strongly consider applying the economic loss rule, unless the contract says otherwise. For now, however, it is clear that in Florida, and other jurisdictions that may potentially adopt such a narrow application of the economic loss rule, defendants may no longer rely on the doctrine to dismiss tort claims outside the realm of products liability.

---

308. *See supra* notes 146–50 and accompanying text.
309. *See supra* notes 170–74 and accompanying text.
310. *See supra* notes 151–53 and accompanying text.
311. *See supra* notes 144–53 and accompanying text.
312. *See supra* notes 144–57, 267–69, 279–81 and accompanying text.